4-6322-17617-CV

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Eric V. Herendeen,

Complainant,

vs.

ORDER

Brett Corson,

Respondent.

The above-entitled matter came on for a probable cause hearing on November 6, 2006, before Administrative Law Judge Bruce H. Johnson to consider a complaint filed by Eric Herendeen on November 1, 2006. The hearing was held by telephone conference call. The parties submitted exhibits which were received during the conference call. The record with respect to the probable cause hearing closed on November 6, 2006, at the conclusion of the telephone conference call.

Eric Herendeen, P.O. Box 318, Preston, MN 55965, participated by telephone, on his own behalf and without counsel (Complainant).

Brett Corson, 21688 State Highway 16, Wykoff, MN 55990, participated by telephone, on his own behalf and without counsel (Respondent).

Based upon the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is probable cause to believe that Brett Corson violated Minn. Stat. § 211B.06, subd. 1 with respect to the statement contained in Item 5 of the campaign advertisement described in the Complaint. The Complaint's allegation that the statement contained in Item 6 of that advertisement violated Minn. Stat. § 211B.06 is dismissed.

ORDER

IT IS ORDERED:

1. That there is probable cause to believe that Brett Corson violated Minn. Stat. § 211B.06, subd. 1, as alleged in the Complaint pertaining to Item 5 of the campaign advertisement.

2. That there is not probable cause to believe that Brett Corson violated Minn. Stat. § 211B.06, subd. 1 as alleged in the Complaint pertaining to

Item 6 of the campaign advertisement and, therefore that portion of the Complaint is DISMISSED.

Dated: November 8, 2006

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Eric Herendeen and Brett Corson are both candidates for Fillmore County Attorney. Mr. Herendeen filed a complaint alleging that text in a campaign advertisement placed by Mr. Corson is false and violates Minn. Stat. § 211B.06 subd. 1.

Legal standard

Minn. Stat. 211B.06, subd. 1, states:

> Gross misdemeanor. A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.
>
> A person is guilty of a misdemeanor who intentionally participates in the drafting of a letter to the editor with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat any candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false,

and that the person knows is false or communicates to others with reckless disregard of whether it is false.

Complainants alleging violation of Minn. Stat. § 211B.06 have a significant burden. Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false. The standard of proof for a violation of Minn. Stat. § 211B.06 is clear and convincing evidence.

As Minn. Stat. § 211B.06 pertains to this proceeding, the Complaint raises two material issues of fact, the existence of which must be proven by clear and convincing evidence—namely, (1) that the statement at issue is false; and (2) that Mr. Corson knew it was false or communicated it with reckless disregard of whether it was false.[1] In *Kennedy v. Voss*[2], the Minnesota Supreme Court addressed the issue of what statements are considered to be false and observed that the statute is directed against the evil of making false statements of fact and not against unfavorable deductions, or inferences based on fact. In other words, in order to be false the statement must be factually inaccurate. Expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.[3] A challenged statement's specificity and verifiability, as well as its literary and public context, are factors to be considered when distinguishing between fact and opinion.[4]

If a statement is found to be false, the statute then requires establishment of another fact by clear and convincing evidence—that the person knew the statement is false or communicates the statement with reckless disregard of whether it is false. The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v. Sullivan*.[5] Based on that standard, a complainant must show by clear and convincing evidence that the respondent prepared or disseminated the campaign material knowing that it was false or did so with reckless disregard for its truth or

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[1] Mr. Corson also argued that the statements at issue dealt with Mr. Herendeen's "failure to act" and therefore did not constitute statements relating to "the personal or political character or acts of a candidate." However, the statute does not require that the allegedly *false statements* relate to the personal or political character or acts of a candidate, it requires that the campaign material must relate to personal or political character or acts. Here, the advertisement as a whole states that Mr. Corson's opponent engaged in "negative and false campaign ads" and therefore related to Mr. Herendeen's character.

[2] 304 N.W.2d 299 (Minn. 1981).

[3] *Jadwin v. Minneapolis Star and Tribune*, 390 N.W.2d 437, 441 (Minn. App. 1986), *citing Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).

[4] *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990).

[5] *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

falsity. The courts have indicated that the test is a subjective one—that a complainant must prove that the respondent "in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.[6]

Evidence presented at the Probable Cause Hearing

Mr. Herendeen and Mr. Corson both submitted exhibits[7] and offered their own sworn testimony at the Probable Cause Hearing. The evidence tended to establish the following:

Matthew Opat became the Fillmore County Attorney in January 1997.[8] Mr. Opat hired Mr. Herendeen as Assistant Fillmore County Attorney.[9] Mr. Herendeen's primary duties were to prosecute traffic offenses, DWI offenses, juvenile delinquency and dependency matters, and certain gross misdemeanor violations.[10] Although it was not his responsibility to prosecute zoning violations or to advise department heads on zoning matters, on one occasion in 1997, Mr. Herendeen handled a zoning matter when the County Attorney had a conflict of interest.[11] On December 20, 2002, Mr. Herendeen notified the Fillmore County Commissioners that he had accepted the position of Chief Deputy Mower County Attorney and that he would resign effective January 16, 2003.[12] The Fillmore County Board accepted Mr. Herendeen's resignation December 24, 2002.[13]

The campaign advertisement at issue concerns semi trailers that were stored at the residence of Dan Moulton near Chatfield, a city in Fillmore County.[14] Mr. Moulton has operated a used semi trailers business on his property since about 1989.[15] In late 2002, Mr. Moulton's semi-trailer business came to the attention of the Fillmore County Zoning Administrator because of a complaint by a neighbor. On February 27, 2004, Norman Craig, Fillmore County Zoning Administrator, wrote Mr. Moulton advising him that the storage of semi-truck trailers on his property was a problem and a violation of Fillmore County Zoning Ordinance. On April 21, 2005, Mr. Moulton appealed the Fillmore County Zoning Administrator's decision to the Fillmore County Board of Adjustment.[16] The

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[6] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski,* 713 N.W. 2d 379 (Minn. App.) *review denied* (Minn. 2006).
[7] Ex. 1 through 14.
[8] Ex. 7.
[9] Ex. 7.
[10] Ex. 7.
[11] Testimony of E. Herendeen.
[12] Ex. 4.
[13] Ex. 5.
[14] Testimony of E. Herendeen; Testimony of Daniel Moulton; Exs. 11, 12 and 14.
[15] Exs. 11, 12 and 14.
[16] Ex. 12.

record suggests that there were further legal proceedings regarding Mr. Moulton's property but these proceedings are not in evidence.[17]

On October 11, 2006, Mr. Herendeen placed a campaign advertisement in the *Spring Valley Tribune.*[18] The advertisement asked if the County Attorney should make backroom deals without consulting the County Board, the Board of Adjustment or the people of Chatfield and asserted that the county attorney allowed 31 trailers to be classified as a Rural Home Based Business in Chatfield.[19] Mr. Corson responded to Mr. Herendeen's advertisement with his own advertisement which ran in several newspapers during the week of October 16-20, 2006.[20] Mr. Corson's advertisement is captioned "Re-elect Brett Corson for Fillmore County Attorney" and continues "I will not engage in negative and false campaign ads like my opponent. I believe in the truth." What follows is a statement: "The truth about the Chatfield trailers and Rural Home Based Business is:" A six item list of statements followed. Mr. Herendeen contends items 5 and 6 are false.

5. My opponent failed to remove the trailers and restrict the business when he was the Assistant Fillmore County Attorney.[21]

6. My opponent's failure to act adversely affected the County.[22]

Probable Cause Analysis:

Following a probable cause hearing, the task of the Presiding Judge is to answer an important question: Given the facts in the record, it is fair and reasonable to require the respondent to go to hearing on the merits? A further hearing on the merits is appropriate if there are sufficient facts in the record to believe that a violation of law as alleged in the complaint has occurred. There are sufficient facts if the Presiding Judge is satisfied that the evidence in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict in a like civil case.[23]

Mr. Herendeen asserts that the statement that he failed to remove the trailers and restrict the business when he was Assistant Fillmore County Attorney is false because he was unaware of complaints about Mr. Moulton's semi-trailer

[17] Exs. 1, 8, and 12.
[18] Ex. 8.
[19] Ex. 8.
[20] Ex. 1; Complaint.
[21] Ex. 1.
[22] Ex. 1.
[23] Minnesota Statutes § 211B.34 (2) (2004). *See, Weinberger v. Maplewood Review*, 668 N.W.2d 667, 674 (Minn. 2003) ("in civil cases probable cause constitutes a bona fide belief in the existence of the facts essential under the law for the action, and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it") (quoting *New England Land Co. v. DeMarkey*, 569 A.2d 1098, 1103 (Conn. 1990)).

business until after he left the Fillmore County Attorney's office.[24] Mr. Corson contends that because the semi-trailers were visible from the roadway, Mr. Herendeen was on notice of the zoning violation while he was Assistant County Attorney. Therefore, Mr. Corson argues that the statement that Mr. Herendeen failed to remove the trailers and restrict the business is not false.[25]

There is conflicting evidence about whether the semi-trailers were visible from the roadway. Mr. Corson submitted a letter from the Zoning Administrator who wrote:

> For over 15 years, Mr. Dan Moulton parked used semi trailers on his property. He had 5 to 10 of them. He kept them behind his barn out of sight and they were not a problem. In late 2002 this office began to hear complaints from Mr. Geoff Griffin concerning the trailers. Mr. Griffin owned the property next to Mr. Moulton and was planning a land Subdivision. He didn't want the perspective landowners in his subdivision to have to look out their windows and seek parked semi trailers. In response to the complaints, Mr. Moulton increased the number of trailers he had parked on his property. As a result this office authored it first letter to Mr. Moulton to clean up the trailers in February 2004.[26]

Mr. Corson submitted an affidavit from Fran Novotny, who stated that "[w]hen I moved to my property 8 years ago, Mr. Moulton was operating his trailer business and they were easily visible from the roadway."[27] Mr. Corson also submitted an affidavit from Mr. Moulton who stated: "Until 2005, all of my trailers were visible from the road."[28]

Mr. Corson has submitted conflicting evidence in support of his assertion. It is not possible to resolve this factual dispute concerning the statement in Item 5 based on the record currently before the Administrative Law Judge. The evidence currently in the record is also insufficient to establish definitively whether the statement was made knowing it was false or made with reckless disregard of whether it was false. After considering all of the evidence in the record, and the arguments of the parties at the probable cause hearing, the Administrative Law Judge concludes that the Complainant has presented sufficient facts to support a hearing on the merits regarding Item 5.

However, the Complaint's allegation regarding the second statement, Item 6, is dismissed. The assertion that a failure to act adversely affected the

[24] Testimony of E. Herendeen.
[25] Testimony of B. Corson.
[26] Ex. 14. The date in the last sentence of Ex. 14 was corrected to read February 2004 by agreement of the parties.
[27] Ex. 10.
[28] Ex. 11.

County is opinion. Minnesota's false campaign material law is directed against false statements of fact, not criticisms, opinion or unfavorable deductions. The assertion that a failure to act has "adversely affected" the County is not a factual statement and is therefore insufficient to support allegation that there was a violation of Minn. Stat. § 211B.06, subd. 1.[29]

B.H.J.

[29] *See also Riley v. Jankowski,* 713 N.W. 2d 379 (Minn. App.) *review denied* (Minn. 2006).